STATE OF MICHIGAN

COURT OF APPEALS

DAVID P. NEUHAUS,

Plaintiff-Appellee,

v

PEPSI COLA METROPOLITAN BOTTLING COMPANY, INC. and LUMBERMEN'S MUTUAL CASUALTY COMPANY,

Defendants-Appellants.

UNPUBLISHED
September 8, 2009

No. 274960
WCAC
LC No. 05-000243

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration as on leave granted. *Neuhaus v Pepsi Cola Metro Bottling Co*, 480 Mich 1000; 742 NW2d 353 (2007). The Supreme Court directed us to consider "whether the WCAC[1] properly awarded an attorney fee on plaintiff's medical benefits award. In answering this question, the Court of Appeals shall consider whether the WCAC correctly construed the term 'prorate,' as it is used in MCL 418.315(1)." *Id.* After the case was submitted for decision, we ordered that it be held in abeyance pending the Supreme Court's decision in *Petersen v Magna Corp*, Supreme Court Docket no. 136542-43. *Neuhaus v Pepsi Cola Metro Bottling Co, Inc*, unpublished order of the Court of Appeals, entered October 14, 2008 (Docket No. 274960). The Supreme Court having issued its decision in *Petersen*, we now affirm the WCAC's award of attorney fees.

Plaintiff David Neuhaus suffered a low back injury when he fell from a cart while working as a delivery driver for defendant Pepsi Cola Metropolitan Bottling Company.[2] The magistrate ordered that plaintiff was entitled to an open award of benefits and

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[1] Worker's Compensation Appellate Commission

[2] Defendant Lumberman's Mutual Insurance Company is the insurance carrier for the Pepsi Cola Bottling Company.

> that all medical benefits related to treatment of the low back are ordered paid and any recovery for any such bills already incurred for medical treatment (including any bills which may have been paid by other providers) are subject to an additional attorney fee of thirty percent of the amount paid or collected . . . .

The WCAC "affirm[ed] the magistrate's award for attorney fees on medical expenses from defendants." The WCAC reasoned that the attorney fee award was consistent with MCL 418.315(1), which provides:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. *The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.* [Emphasis added.]

On appeal, defendants argue that an award of attorney fee under § 315(1) must be divided proportionately, not added to the amount of medical expenses that they are required to pay. Their position, it appears, is that an attorney fee award is not to be paid by the employer or its insurance carrier, but by the employee and/or the health care provider(s) and prorated in accordance with the amount of medical expenses for which the employee has paid and is reimbursed and the amount that the employer pays directly to the health care provider(s).[3] We review de novo questions of statutory interpretation. *Paige v Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006).

In *Petersen v Magna Corp*, ___ Mich ___; ___ NW2d ___ (2009), a majority of the Supreme Court concluded that employers and their insurance carriers, and not health care providers and employees, are the only parties subject to a proration of attorney fees under § 315(1). *Id.* at ___ (opinion by Kelly, C.J.) and ___ (opinion by Hathaway, J.).[4] The Supreme Court majority affirmed the magistrate's order that the defendants, "various business entities that were either found to be plaintiff's 'employer' for purposes of the WDCA[5] or else liable for those payments as insurers," *id.* at ___ n 2 (dissenting opinion by Markman, J.), pay $46,034 for the plaintiff's attorney fees. *Id.* at ___ (opinion by Kelly, C.J.) and ___ (opinion by Hathaway, J.).

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[3] Defendants do not argue that the award of attorney fees, itself, was improper.

[4] Justice Cavanagh joined Chief Justice Kelly's opinion, while Justice Weaver joined Justice Hathaway's opinion.

[5] Worker's Disability Compensation Act, MCL 418.101 *et seq.*

Pursuant to *Peterson*, defendants were the only parties subject to a proration of attorney fees under § 315(1) and the fees could be imposed against defendants in addition to the payments of plaintiff's medical expenses. Accordingly, we affirm the WCAC's award of attorney fees.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Cavanagh
/s/ Brian K. Zahra